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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 931

JAMES S. RAIDY

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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JAMES S. RAIDY, your Petitioner, prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on February 11, 1958.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court, printed in Record 1a, p. 61, is reported in 153 F. Supp. 777. The opinion of the Circuit Court of Appeals, printed in Appendix A hereof, p. 16, is unreported as yet.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on February 11, 1958; Appendix A, p. 16, infra.

The jurisdiction of this Court is invoked under Title 28, United States Code Annotated, Section 1254 (1).

QUESTIONS PRESENTED

I. Is the seaworthy cause of action available to a shipfitter working on a vessel in a floating drydock who was injured at night under poor lighting conditions by falling through an unguarded hole in the operating walkway of the vessel?

II. Is a negligence cause of action made out where the uncontradicted facts established that a shipfitter working on a vessel in floating drydock was injured at night under poor lighting conditions by falling through an unguarded hole in the walkway after the shipowner's representatives knew the working conditions were unsafe but gave no warning and took no precautionary measures?

STATEMENT

The libel was brought under the Suits in Admiralty Acts (U.S.C.A. Tit. 46 sec. 741 *et seq*) against the United States as owner of the dredge, *S.S. Goethals* and claimed recovery for unseaworthiness, and in negligence, for failure to furnish a safe place to work. The Government impleaded Bethlehem and the case was tried by the District Judge without a jury.

The Petitioner, a ship fitter employed by Bethlehem sustained crippling injuries on the evening of October 27, 1954, when he fell some 30 feet through an unguarded hole in one of the operating walkways of the vessel.

It was *uncontradicted* that at the time of the accident he was working on one of the operating walkways of the vessel; that there was a hole in the walkway due to a miss-

ing plate; that the accident occurred at night and the lighting was poor. The District Court denied recovery as to each count, holding that the seaworthy warranty was not available and that the Government was not negligent. On appeal the Court of Appeals affirmed the Judgment of the District Court in a *per curiam* opinion.

Before the accident the *Goethals* was actively engaged in her duties as a navigable and seaworthy vessel. She came to the Bethlehem shipyard in Baltimore for the usual 12-18 month overhaul and the conversion of her unloading system; certain repairs and renovations were also to be made. Under the contract for the work, Bethlehem agreed to provide a safe place to work for its employees and to indemnify the Government against any liability for injuries resulting from the fault, negligence, wrongful acts or omissions of Bethlehem. The vessel was placed in a floating drydock for 13 days, although the over-all work lasted for a longer period. While in the dock some of the crew, including the chief electrician, maintained their quarters aboard the vessel and the Government had several inspectors aboard. (R. 1a, p. 19, 52; 2a, p. 3) After the work was completed the vessel resumed her service in navigation.

The accident occurred after night had fallen. The Government inspectors knew that work would be done at night requiring the use of the walkway and that sufficient lighting would be necessary. (R. 1a, p. 19, 51) However, although the customary lighting for the walkway had been removed before the accident, no substitute lighting was furnished and no warning of the hole was given. (R. 1a, p. 26, 46, 51-55) At the point where the Petitioner was working (the starboard side), there was no light at all. (R. 1a, p. 53, 55) The lighting there was described by the chief electrician as "very poor" and the District Court found this as a fact. (R. 1a, p. 52, 55, 64)

The Petitioner was working on one of the operating walkways of the vessel when he was hurt. The walkway consisted of removable steel plates 3x3 feet. One of the walkway plates located behind a work bench was missing, leaving a hole. There was a sheer drop of 30 feet from the hole to the bottom of the mixing well. The chief Government inspector had seen the hole earlier in the day but no precautions were taken and no warning was given. (R. 1a, p. 45)

The petitioner had been working below deck when he was instructed to go to the upper area to help lay a "chalk line,"—a guide line for the installation of a hopper. (R. 1a, p. 24, 25) He did not know there was a hole in the walkway. (R. 1a, p. 26) He complained about the lack of light but was told it was a "small job" which would only take a short time. (R. 1a, p. 25, 26) As he proceeded along the walkway with the line in the customary manner, he came into contact with the work bench and was feeling his way around it in the darkness when he plunged through the hole to the bottom of the mixing well. (R. 1a, p. 21, 26) *After* the accident a light was placed at the hole and the Government inspectors required a report of the accident. (R. 1a, p. 13-14)

The Petitioner suffered permanently crippling injuries including many fractures, internal injuries and disabling injuries to the spine, pelvis and brain. He has received a total of $895.00 in compensation payments. (R. 2a, p. 3) Under the terms of the Longshoremen and Harbor Workers' Act, he cannot claim any substantial additional benefits.

REASONS FOR GRANTING THE WRIT

I. CONFLICT AMONG DECISIONS OF CIRCUIT COURTS OF APPEALS—UNSEAWORTHINESS.

Conflict and uncertainty mark the decisions in the circuits as to the applicability of the seaworthy rule to shipyard workers. The District Court expressed the prevailing uncertainty at the close of the trial:

> ". . . Now, the question here is whether the *Sieracki* case is to be limited or to be extended. Now, is it not probably the situation, here, that . . . nobody will ever know until the Supreme Court decides it? . . . We do not have any *pro forma* orders in this Court. But it is the kind of case, after I have heard the respective arguments, in which, apparently, there is no flat decision of the Supreme Court, itself. Each side feels that its side of the case is consistent with the Supreme Court cases; but it looks to me as if the question were not definitely settled at the present time." (R. 1a, p. 61)

The 3rd Circuit Court of Appeals holds that unseaworthiness may be asserted by a repairman who was injured because of inadequate lighting while working on a vessel undergoing major conversion in the shipyard. *Read v. U. S.*, 201 F. 2d 758 (CA 3, 1953). The Court ruled that no distinction could be made between the repairman and the carpenter who was granted recovery in *Hawn v. Pope & Talbot, Inc.*, 3 Cir., 1952, 198 F. 2d 800, *affirmed*, 346 U. S. 406 (1953).

The 1st and 6th Circuits evince support for the 3rd Circuit's ruling. In *Christiansen v. U. S.*, 192 F. 2d 199 (1951) the 1st Circuit indicated that employees of a tank cleaning company were among the workers who could invoke unseaworthiness. The 6th Circuit in the case of a shipfitter who fell into an unguarded hole while the vessel was under repair during its winter lay-up, declared that recovery could have been based on unseaworthiness, al-

though the actual decision was grounded in negligence since the unseaworthiness claim had been withdrawn at the trial. *Pioneer Steamship Co. v. Hill,* 227 F. 2d 262 (CA 6, 1955). See also the language of the 6th Circuit in *Imperial Oil Ltd. v. Drlik,* 234 F. 2d 4 (1956) where a dock-worker was injured:

> ". . . The rule (unseaworthiness) has lately been extended to stevedores and others doing a seaman's work and incurring a seaman's hazards, although not in the employ of the owner of the vessel. [Citing *Sieracki, Hawn* and *Petterson* cases.] Appellee would fall within the protection of the rule so extended. . . ."

In the circuits that deny the applicability of the seaworthy warranty in like settings, there is disagreement as to the basis for the denial, thus foreshadowing ever-increasing conflicts. In the present case, the 4th Circuit denied a ship fitter working on a vessel undergoing major conversion in a shipyard the benefit of the unseaworthy rule, stressing the vessel's withdrawal from navigation and its surrender to the shipyard.

The conflict with the 3rd Circuit's decision in *Read* is plain although it was not openly stated. However, the 2nd Circuit in *Berge v. National Bulk Carriers Corp.* 251 F. 2d 717 (1958) conceded the conflict in denying the seaworthy warranty to a rigger working on a vessel in the shipyard who was injured when a shackle pin broke and the tackle fell upon him. The Court flatly said:

> ". . . We disagree with *Read v. United States,* 201 Fed. 2d 758 (CA 3)."

In *Berge,* the Court said that the test in determining whether the seaworthy doctrine would be applied was whether the workman was engaged in work of a kind that the crew of the vessel was accustomed to perform. But the nice line separating the cases became immediately apparent in *Halecki v. United N.Y. and N.J. Sandy Hook Pilots*

Ass'n, 251 F. 2d 708 (1958), a companion case, where a recovery was allowed a shoreside electrician engaged in cleaning the ship's generators by spraying them with a dangerous chemical. In *Halecki*, as in the instant case, the vessel was undergoing an annual overhaul and inspection at the repair yard and it was neccessary to use electric current from shore as the vessel was without her own. The Court acknowledged the unsatisfactory nature of its differentiation between *Berge* and *Halecki* by remarking:

> "As might be expected, so shadowy a line of demarcation will in application produce inconsistent results. . . ."

The decision in the present case increases the confusion by emphasizing the concept that a vessel undergoing major repairs is removed from navigation, hence the seaworthy warranty is unavailable. Under this view it is submitted that Halecki would not have gotten a recovery in the 4th Circuit. It also raises more problems than it solves because the crucial question becomes when are the repairs major enough to deprive the injured workman of the benefit of the seaworthy warranty? The maritime worker's right to invoke seaworthiness will come to be determined not by the work he is performing but by the nature of his employer's contract for repairs to the vessel. It is evident that serious injustice, many times on a hair-splitting basis, will certainly result.

The 9th Circuit Court of Appeals in *Berryhill v. Pacific Far East Line*, 238 F. 2d 385 (1956) emphasized that the unseaworthiness rule should be restricted to workmen engaged in loading and unloading operations, in refusing a machinist recovery for injuries caused by the explosion of a grinding wheel brought on board by his employer; thus again raising the question whether Halecki, the electrician, would have been awarded recovery in the 9th Circuit.

II. CONFLICT IN PRINCIPLE WITH DECISIONS OF THIS COURT—UNSEAWORTHINESS

The views of the Court below are inconsistent with, and it is believed, disregard the true meaning of this Court's opinions. In *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, (1946), it was held that unseaworthiness gives rise to absolute liability, regardless of fault and that a longshoreman could claim the warranty against the shipowner. For some time *Sieracki* received a narrow interpretation in the lower courts, as illustrated by the 2nd Circuit's decision in *Guerrini v. U. S.*, 167 F. 2d 352 (1948) which refused to extend the rule to cover harbor workers other than stevedores.

This approach was again evidenced below, although the position had been made untenable as far back as 1953 with the decision in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, where the majority clearly gave *Sieracki* the broadest reading. Hawn was a carpenter whose employer was engaged to repair the grain feeders on a ship and was injured when he slipped on some loose grain. Although the Court was urged to reverse *Sieracki* or at least limit its application to longshoremen, it chose to "adhere to *Sieracki*" and extended the doctrine to cover *workers like Hawn*. The opinion emphasized that Hawn's need for protection from unseaworthiness was the same as that of the stevedores working with him; that *all were subjected to the same danger and all were entitled to like treatment under the law*. Since then the 2nd Circuit has acknowledged that it was wrong in *Guerrini*.

In this case the Courts below have completely ignored the underlying consideration in *Hawn* to grant the remedy to maritime workers exposed to the same dangers and have emphasized only the "traditional work of seamen" passage as the criterion for the application of the seaworthiness

rule. This has led to discriminations without solid basis as the 2nd Circuit recognized in *Halecki*. The attempt to categorize workers who perform essentially similar tasks, into those who may obtain the protection of the rule and those who cannot, is impractical and unworkable.

The repairman is as closely connected with maritime service as the longshoreman, the cleaner, the carpenter or the painter. He is equally exposed to the hazards of ship's work. Despite this, the unseaworthiness rule is denied him but granted to other workers. Indeed, the dissenting opinion in *Halecki* insisted forcefully that the work of the rigger who was refused recovery in *Berge* was as close to traditional seamen's activity (even more so the Judge thought) as the work of the electrician engaged in the specialized work of spraying the ship's generators with a chemical, who was granted a recovery in *Halecki*. Moreover, Halecki, unlike Berge or Petitioner, was employed principally ashore, not on ships.

It is respectfully submitted that discriminations of this sort are unfair and were not intended by this Court. Let us suppose that Raidy, the injured workman in the present case, instead of a ship fitter, was a carpenter or cleaner working on the vessel. In the supposed case, it seems the 2nd Circuit would apply the seaworthy rule because the work could be assimilated to the customary work of seamen; but the ship fitter would be denied its protection. *A fortiori*, in the 4th Circuit, even the carpenter or cleaner could not claim recovery because under its ruling unseaworthiness is not available where a vessel is undergoing major work.

Surrender of control.

In reaching the present decision, the Courts below relied heavily on the rejected "surrender of control" doctrine. In

Alaska S.S. Co. v. Petterson, 205 F. 2d 478 (CA 9, 1953), 347 U.S. 390 (1954), this Court upheld a recovery based on unseaworthiness due to faulty equipment brought on board by the injured stevedore's employer, although control of the vessel had been surrendered. See also *Rogers v. U.S. Lines,* 347 U.S. 984 (1954). After these decisions, the 2nd Circuit which had evolved the Control Doctrine openly repudiated it. See *Tarkington v. U.S. Lines Co.* 222 F. 2d 358 (1955).

Despite this, in the present case the District Court relied strongly upon surrender of control as did the Court of Appeals which, during the argument and in its opinion, stressed that the lighting for the work was controlled and was to be supplied by the shipyard:

> ". . . He complains of the hole in the catwalk and contends that the lighting was insufficient, *although the lighting for the repair job was furnished by the shipyard and not by the vessel. . . .*"

And again,

> " '. . . *The owner maintained no control over the work* by the independent contractor other than the right to inspect to determine whether the structural changes were being performed in accordance with the elaborate specifications. . . .' " (Emphasis supplied) *Raidy v. United States.* (Appendix A, p. 16.)

This represents an attempt to revive the discarded doctrine and re-introduce the fault concept as the basis for liability in unseaworthiness cases, contrary to this Court's decisions. It also raises doubts which, unless dispelled, will increase the confusion in the lower courts and serve to arrest the development of the law as intended by this Court.

Also, the theory that a vessel undergoing major repairs is removed from navigation and is therefore not subject to

the Admiralty rules, seems directly contrary to this Court's holding in *The Jefferson*, 215 U.S. 130 (1909), where it was said that a vessel in drydock for major repairs remains an object of the Admiralty law.

Court's interest in questions.

This Court evinced its intention to resolve the questions when it granted certiorari in *Lester v. U. S.*, 234 F. 2d 625 (CA 2, 1956, *cert.* granted, 352 U.S. 889, 1956), a claim based upon unseaworthiness by an electrician working on a vessel in drydock. However, the case was settled before consideration of the merits and was therefore dismissed from the docket. It is interesting to observe that in the Government's brief opposing certiorari it was conceded that unseaworthiness could be invoked:

> "Under the decisions of this Court, petitioner, a shore based electrician, is, of course, entitled to a seaworthy ship which means that the ship must be 'reasonably fit' but not that it can 'weather all storms'." (Gov. Br. p.8)

But the Government has reversed its position and now asserts that the seaworthy warranty is inapplicable.

In the interval since *Lester*, the conflicts and uncertainty in the circuits have increased to the point where a review and authoritative ruling is urgently required. It is submitted that the present bewildering state should not be permitted to continue where fortuitous circumstances as to the extent of the work done on a ship or the locale of an accident will determine whether an injured maritime worker will be accorded the protection of the seaworthy warranty.

III. CONFLICT IN APPLICATION OF NEGLIGENCE PRINCIPLES.

The decision in this case has for practical purposes denied the right of a dockyard worker to maintain an action in

negligence. Customarily the shipowner relinquishes control of the vessel when it is turned over to the dockyard for repairs. If a dockyard employee is injured due to failure to supply a safe place to work, he cannot sue his employer, under the provisions of the Longshoremen's and Harbor Workers' Act*; and, under the rule now laid down in the 4th Circuit, he cannot recover against the shipowner *even though its representatives knew that the working conditions were unsafe and took no precautionary measures.* So that, except for the extraordinary case where the shipowner's representatives remain in active control after the vessel is turned over to the yard the shipyard worker is left without a negligence action.

The 4th Circuit's position is that transfer of the vessel to the shipyard immunizes the shipowner from a negligence claim. This is contrary to the decisions in the other circuits which recognize that the fundamental duty to supply a safe place to work persists whether actual control of the vessel is retained by the owner or transferred to a contractor.

In *Halecki*, supra, the 2nd Circuit Court of Appeals stated the correct rule: (per Judge Hand)

> ". . . The deceased was certainly an 'invited person,' or 'business guest,' and the shipowner was liable, not only for the negligence of the master, but, although the work was let out to a subcontractor, also for any lack of 'reasonable care to ascertain the methods and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities'. . . ."

*33 U. S. C. A., Sec. 901 et seq.

And the 3rd Circuit Court of Appeals said in *Feinman v. A. H. Bull S.S. Co.*, 216 F. 2d 393 (1954): (per Judge Biggs)

> "Obviously in a diversity suit brought by a longshore worker against a shipowner, based on negligence, as in the case at bar, the shipowner cannot be relieved of liability when the ship's appliances have become defective or broken simply because he has relinquished control of the vessel to a stevedoring company. . . ."

This is not a case where the important facts were disputed and we are not asking the Court to reexamine fact findings of the lower Courts. We do insist that the Courts below were incorrect in deciding that the shipowner could not be held in negligence simply because the vessel was in the shipyard's control when the accident occurred. It is difficult to imagine a more dangerous situation for a shipworker than a hole in a walkway on which he is working at night without sufficient light. These were the working conditions supplied Petitioner. Yet, the Courts below disregarded *uncontradicted evidence* that the shipowner's representatives knew of the unsafe conditions and failed to take any precautions, to wit:

That at the time of the accident part of the crew was living aboard, including the chief electrician who was present when the accident occured and testified the lighting was "very poor". (R. 1a, p. 52) That the chief government inspector saw the hole in the walkway before the accident. (R. 1a, p. 45) The government inspectors knew that work would be done after dark requiring the use of the walkway. (R. 1a, p. 19) They knew that the customary lighting had been removed. (R. 1a, p. 51) They knew that adequate light was required for the work. Despite this, no warning was given and no precautions were taken, although the customary safeguard was to place a light at a hole. (R. 1a, p. 26, 46, 51-55) That Petitioner did not know the hole was there. (R. 1a, p. 26) That *after* the accident a light

was placed at the hole and the Government inspectors required a report. (R. 1a, p. 13, 14)

It is submitted that these undisputed facts would undoubtedly have been sufficient for a finding of negligence in any circuit but the 4th, which alone among the circuits, regards the vessel's transfer to the shipyard as foreclosing the need for further inquiry. Also the decision below is a step towards the obliteration of the negligence cause of action, contrary to this Court's opinion in *Pope & Talbot, Inc. v. Hawn,* supra, which carefully preserved the harborworker's negligence cause of action:

> "The fact that *Sieracki* upheld the right of workers like Hawn to recover for unseaworthiness does not justify an argument that the Court thereby blotted out their long recognized right to recover in admiralty for negligence."

Importance of third party action.

The decision below and similar decisions which curtail and restrict 3rd party actions usually assume the sufficiency of the remedies provided by the Longshoremen and Harbor Workers Act. This comforting assumption is rudely shaken when we consider the meager remedy afforded by the Act in this case.

The Petitioner has received only $895.00 in compensation payments and has little prospect of any additional payment. The Act does not provide compensation for pain and suffering; for loss of sexual power, for internal injuries and brain injuries; for inability to enjoy life as before the accident. It does not provide compensation for the permanent impairment of his vital bodily functions since they are not among the scheduled injuries; nor partial compensation in a case such as this, where Petitioner has returned to light work at the same wages; it does not take into account the uncertainty of continued light employment and the tragic con-

sequences to Petitioner if he is terminated. And even if he could be put back on compensation, the Act provides only a fraction of the present day cost of living and reduces him from a full provider for his family to a compensation pauper. These factors can receive recognition only in a 3rd party action.

CONCLUSION

The importance of the questions involved and the conflict and uncertainty in the lower courts present a compelling case for review to resolve the conflicts, as well as to reverse the incorrect decision below.

Respectfully submitted,

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MARVIN I. SINGER,

Counsel for Petitioner.

APPENDIX A

OPINION OF COURT OF APPEALS

Before PARKER, Chief Judge, and SOPER and SOBELOFF, Circuit Judges.

PER CURIAM:

This is an appeal in a suit in admiralty brought to recover damages sustained by a shipyard worker while working on a government vessel which had been turned over to the shipyard for major repairs and which was then in dry dock in the course of being repaired. The worker was injured when he fell through a hole in a catwalk on the vessel which was caused by the removal of a plate in the course of the repairs being made by the shipyard. He complains of the hole in the catwalk and contends that the lighting was insufficient, although the lighting for the repair job was furnished by the shipyard and not by the vessel. The trial judge exonerated the United States, as owner of the vessel, from the charges of negligence and unseaworthiness, correctly stating as to the latter:

> "In the instant case the libelant shipyard worker was performing duties not within the competence or the traditional or customary activities of the crew. His status therefore was very different from that of a seaman. The ship was in drydock for structural changes which could not have been performed by the crew. In fact the crew had been discharged long before the accident occurred. The ship at the time was not subjected to any perils of navigation. In fact it had necessarily been withdrawn from navigation for a long period. The owner maintained no control over the work by the independent contractor other than the right to inspect to determine whether the structural changes were being performed in accordance with the elaborate specifications. It seems to me a misnomer to speak of the removable and absent footplate as 'unseaworthiness of the ship'. The removal of the absent plate, for the

substitution of others, was a part of the work required to be performed by the contract specifications."

We agree with the trial judge that there was no liability on the part of the United States as owner, for reasons adequately stated in the opinion below, which is adopted as the opinion of this court. See *Raidy v. United States* 153 F. Supp. 777. See also *Berryhill v. Pacific Far East Line* 9 Cir. 238 F. 2d 385, cert. den. 354 U. S. 938.

Affirmed.

DECREE

Filed and Entered February 11, 1958.
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEALS FROM the United States District Court for the District of Maryland.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

JOHN J. PARKER
Chief Judge, Fourth Circuit.

MORRIS A. SOPER
United States Circuit Judge.

SIMON E. SOBELOFF
United States Circuit Judge.